

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE PETITION)	
OF DIRECT ENERGY SERVICES, LLC)	
TO REQUEST THE PUBLIC SERVICE)	
COMMISSION TO ISSUE, ON AN EXPEDITED)	
BASIS, AN ORDER DIRECTING DELMARVA)	PSC DOCKET NO. 16-0744
POWER & LIGHT COMPANY TO DISTRIBUTE)	
AN EDUCATIONAL BILL INSERT REGARDING)	
THE OPTIONS AVAILABLE UNDER THE)	
CONTRACT AWARDED BY THE STATE OF)	
DELAWARE)	
(FILED JUNE 30, 2016))	

**Response of Delmarva Power & Light Company
In Opposition To the Petition of Direct Energy Service, LLC**

Delmarva Power & Light Company, (Delmarva Power), by and through its undersigned counsel, hereby opposes the petition of Direct Energy Services, LLC. In support of its opposition, Delmarva Power provides as follows:

A. Background

1. On June 30, 2016, Direct Energy Services, LLC (“Direct Energy”) filed a petition (the “Petition”) with the Delaware Public Service Commission (the “Commission”). In the Petition, Direct Energy asks the Commission to order Delmarva Power to distribute a bill insert to all of Delmarva Power’s Residential and Small Commercial customers in the State of Delaware. According to the Petition, the bill insert would: (1) advise customers of their ability to shop for an electric supplier; (2) inform customers that distribution service will continue to be provided by Delmarva Power; (3) inform customers about the Electric Affordability Committee program; (4) describe the competitive retail energy supply offerings of Direct Energy; and (5) describe Direct Energy’s available competitive retail rooftop solar systems and products.

2. Although Direct Energy characterizes the proposed billing insert as an “educational” bill insert, the clear purpose of the bill insert is to *advertise* the competitive retail choice products offered by Direct Energy through its contract with the Delaware Secretary of State’s Office to Delmarva Power’s distribution customers. While there may be an educational component within the proposed bill insert, Direct Energy’s own description of its proposed bill insert makes clear that the true objective of the bill insert is to convince customers to sign up for competitive products offered by Direct Energy through its contract with the Delaware Secretary of State’s Office. Direct Energy wishes to force Delmarva Power to use its billing envelopes to advertise Direct Energy’s competitive “electric supply offering(s) for Residential and Small Commercial customers” and Direct Energy’s “low price per watt roof-top installation...”¹ Direct Energy’s Petition further states (correctly) that the “Commission has jurisdiction and oversight over the marketing of products” that Direct Energy seeks to sell to Delmarva’s customers.² Direct Energy’s characterization of the proposed bill insert as “educational,” does not change the fact that the proposed bill insert seeks to advertise competitive retail offerings.

3. The Commission issued an Opening Order in this docket on July 26, 2016.³ The Opening Order provided that written comments in response to the Petition must be filed on or before August 31, 2016. This submission constitutes Delmarva Power’s written comments opposing Direct Energy’s request to force Delmarva Power to use its billing envelopes to advertise Direct Energy’s competitive retail offerings.

¹ Petition at ¶6 on page 4.

² Id. At ¶5 page 3 (*emphasis added*).

³ Order No. 8922, PSC Docket No. 16-0744 (July, 26, 2016).

B. Delmarva Power Supports Electric Retail Choice

4. Delaware is a retail electric choice state. Delmarva Power strongly supports retail electric choice competition for its electric distribution customers. A competitive and fair retail choice environment serves to provide customers who choose to shop for their electricity supply the opportunity to save money on the Supply portion of their monthly utility bill. In addition to savings, some competitive retail choice suppliers offer other “value added” products to their competitive supply offerings, such as smart thermostats, green energy products/services, and other benefits not generally available through Standard Offer Service (“SOS”) supply. Delmarva Power believes that a transparent, open and fair retail electric choice market in Delaware provides its customers with the opportunity to not only save money, but also to enjoy additional energy products and services.

5. Delmarva Power is currently working with Commission Staff, the Division of the Public Advocate (DPA), and the Retail Energy Supply Association (“RESA”) in Commission Docket 15-1693. Docket 15-1693 was opened in response to a petition filed by the Electric Affordability Committee (EAC).⁴ The EAC was established by the Delaware General Assembly and charged with evaluating an opt-in electricity affordability program for residential and small business customers and evaluating the program based upon the potential benefits derived from a combination of products and services being offered..⁵ Through Docket 15-1693, the participants, including Delmarva Power, are working on various ways to improve the Delaware competitive retail electric choice market.⁶ Delmarva Power encourages its customers to investigate the options available to them in the Delaware competitive retail choice market. Currently, there are over 140 electric suppliers certified by the Commission to provide competitive retail electric

⁴ PSC Order No. 8845 in PSC Docket no 15-1693 (January 19, 2016) at p 1.

⁵ *Id.*

⁶ *Id.* at pp 1-3.

supply in Delaware.⁷ Most of those certified suppliers do not actively market customers in Delaware, however. An important goal of Docket 15-1693 is to make program changes that will encourage *more* suppliers to actively participate in the competitive retail choice market in Delaware.

C. Delmarva Power's Monthly Bill Inserts

6. Delmarva Power's primary means of communicating with its customers is through its monthly bill inserts. Delmarva Power uses bill inserts to communicate a variety of information to its customers, including: energy conservation, demand response programs, rate changes, community events, renewable energy, customer service, low income assistance, and other utility issues. The bill inserts are provided with the bills of over 300,000 Delmarva Power Delaware customers. Delmarva Power has attached a sample of several bill inserts as "Exhibit A" for the convenience of the Commission.

D. Ordering Delmarva Power to Advertise Direct Energy's Competitive Products Through Delmarva Power's Bill Inserts Would Damage Retail Electric Choice in Delaware by Providing Direct Energy With an Unfair Competitive Advantage Over Delaware's Other Competitive Retail Choice and Rooftop Solar Providers

7. Delmarva Power has consistently refused to allow any competitive entity to use its bill inserts. That prohibition applies not only to competitive retail electric suppliers and rooftop solar providers, but to any competitive business enterprise.⁸ Delmarva Power's bill inserts are intended for use by Delmarva Power to provide information that Delmarva Power determines to be important to its customers.

⁷ The Commission maintains a list of certified retail electric suppliers on its website: <http://depsec.delaware.gov/pdfs/electric/elecsupplierinfo-updated%207-3-2016.pdf>.

⁸ For example, Delmarva Power would deny access to a home improvement services provider, a restaurant, or any other competitive business entity.

8. Requiring Delmarva Power to allow a competitive retail electric supplier to use Delmarva Power's billing envelopes to advertise its offerings would result in an unfair competitive advantage and would, therefore, damage the competitive retail choice market to the detriment of Delmarva Power's customers. Direct Energy is seeking to use Delmarva Power's bill inserts to obtain unprecedented access to over 300,000 Delmarva Power distribution customers. If permitted, the result would be that Direct Energy would have an unfair competitive advantage over Delaware's other certified electric suppliers authorized to do business within Delmarva Power's service territory. If the choice market is not fair and open, fewer suppliers will participate in the Delaware market, which will lead to less competition, fewer choices, and higher prices. That result would undermine what the participants and the Commission are trying to achieve through Docket No. 15-1693.

9. Advertising the offerings of a competitive retail electric supplier through Delmarva Power bill inserts would also suggest that Delmarva Power has a preference for the products and services being offered by that supplier. The result would be detrimental to retail electric choice in Delaware: First, advertising Direct Energy's offerings through Delmarva Power's bills would misrepresent to Delmarva Power's customers that Direct Energy is somehow preferred by Delmarva Power. Second, it would indicate to customers that Delmarva Power believes that the various retail electric supply options offered by Direct Energy are somehow superior to the products and services offered by the other certified electric suppliers doing business in Delaware. That situation would provide Direct Energy with an additional unfair competitive advantage over Delaware's other certified electric suppliers, ultimately resulting in less competition, fewer choices and higher prices. The goal of Commission Docket 15-1693 is to improve the Delaware competitive retail electric choice market. Encouraging more

suppliers to participate in the competitive retail choice market in Delaware is considered a critical element in achieving that goal. Forcing Delmarva Power to include Direct Energy's advertisements in its bill inserts would damage retail electric and solar competition to the detriment of Delmarva Power's customers. Direct Energy's request is inconsistent with the goal of Commission Docket 15-1693 and, as such, must be denied.

**E. Allowing Direct Energy to Advertise
Through Delmarva Power's Bill Inserts
Would Violate the Commission's Code of Conduct**

10. This Commission has always recognized that avoiding unfair competitive advantages is critical to developing and maintaining a healthy competitive retail electric choice market in Delaware. Shortly after the General Assembly enacted the Electric Utility Restructuring Act of 1999,⁹ which created competitive electric retail choice in Delaware, the Commission adopted the "Code Of Conduct Governing Regulated Utility Activities and Competitive Activities" (the "Code of Conduct").¹⁰ The primary purpose of the Code of Conduct is to assure that neither an unregulated affiliate of Delmarva Power, nor *any* third party competitive supplier, is able to gain an advantage in the competitive retail electric marketplace by virtue of an actual or perceived relationship with Delmarva Power.¹¹ In order to achieve that objective, the Code of Conduct prohibits Delmarva Power from indicating a preference for the products and services of one competitive retail supplier over those of another (*"[Delmarva Power] shall not specify a preference for any ... Third Party's products and services over those of any other Third Party"*).¹²

⁹ 72 Del. Laws c. 10 (March 31, 1999).

¹⁰ The Code of Conduct was adopted by Commission Order No. 5469 in Docket No. 99-582 (June 20, 2000).

¹¹ See, Findings and Recommendations of the Hearing Examiner at pp. 9 and 12, which was approved by Order No. 5469.

¹² Code of Conduct, § B 10 (a), PSC Order No. 5469.

11. The effect of ordering Delmarva Power to allow Direct Energy to advertise its competitive retail electric supply and solar offerings through Delmarva Power's bill inserts would be to indicate to over 300,000 Delmarva Power customers that: (a) Direct Energy is somehow approved, endorsed or preferred by Delmarva Power, and (b) Delmarva Power believes that the various retail electric supply and solar rooftop options offered by Direct Energy are somehow superior to or in some other way preferred by Delmarva Power over the products offered by the other certified electric suppliers operating in Delaware. Allowing Direct Energy to advertise its retail electric supply and solar options through Delmarva Power's bill inserts would violate the Code of Conduct by indicating to Delmarva Power's customers that Delmarva Power has a preference for the products and services of Direct Energy over those offered by other suppliers.¹³ As such, Direct Energy's petition must be denied.

**F. Ordering Delmarva Power to Include a
Bill Insert Advertising Direct Energy's
Competitive Retail Choice Products Would
Violate Delmarva Power's First Amendment
Right to Free Speech**

12. There are numerous reasons why Delmarva Power objects to having Direct Energy, or any other competitive entity, use its bills to advertise competitive offerings, including:

- a. Delmarva Power's bill inserts are its main method for communicating information to its customers and are intended for Delmarva Power's messages to its customers;
- b. Delmarva Power does not want its bill inserts to be used by any third party competitive entity, nor does Delmarva Power want to be perceived as having a preference for any competitive retail supplier; and
- c. Forcing Delmarva Power to publicize the offerings of any competitive retail supplier would violate the Code of Conduct and damage the

¹³ *Id.*

choice market in a manner that would be detrimental the interests of Delmarva Power and its customers.¹⁴

Forcing Delmarva Power to distribute Direct Energy's bill insert would be forcing Delmarva Power to convey a message that it does not want to convey. The right to free speech under the First Amendment to the United States Constitution prevents that kind of compelled speech.

13. In *Pacific Gas & Electric Company v. Public Utilities Commission of California* (“*PG&E v. PUC*”), the United States Supreme Court was faced with a factual scenario similar to what is currently before the Commission in this docket.¹⁵ The *PG&E v. PUC* case involved a dispute over the request of a non-profit entity, “TURN,” to use the bill inserts of PG&E, an investor owned regulated utility, to communicate with PG&E's customers. PG&E's billing inserts consisted of contents that “range from energy-saving tips to stories about wildlife conservation, and from billing information to recipes.”¹⁶ The California PUC determined that TURN had aided the PUC in performing its regulatory function and that customers would benefit

¹⁴ Delmarva Power is also concerned about representations Direct Energy has made to customers. For example, in an announcement on Direct Energy's website dated July 12, 2016, Direct Energy made the following statement, which as of the date Delmarva Power's response was filed (August 31, 2016), remains on Direct Energy's website:

“[Direct Energy is] thrilled to share that the State of Delaware has formally named Direct Energy as the ‘Electric Retail Supplier Exclusively Contracted by the State of Delaware.’

As part of the groundbreaking agreement, Direct Energy will serve 315,000 residents and businesses in the Delmarva territory....” (*emphasis added*) (See, “Exhibit B” attached hereto).

The statement that “Direct Energy *will serve* 315,000 residents and businesses in the Delmarva territory” (which would represent Delmarva Power's entire residential and small commercial customer base) is inaccurate and likely confusing to customers. The fact is that Direct Energy may use its contract with the State to *seek to convince* Delmarva Power customers to switch from another retail electric supplier, or from SOS, to Direct Energy's offerings, but that is *not* what Direct said in that statement. Customers who read Direct Energy's announcement may now mistakenly believe that Direct Energy “*will*” be their new energy provider, because that is exactly what the erroneous statement says. Delmarva Power does not want to be associated with that type of incorrect and confusing communication.

¹⁵ *Pacific Gas & Electric Company v. Public Utilities Commission of California*, 106 S.Ct. 903 (1986).

¹⁶ *Id.* at 907.

from allowing TURN to include communications in PG&E's billing envelopes.¹⁷ Despite PG&E's opposition to allowing TURN to use its billing envelopes to disseminate TURN's message, the California PUC ordered PG&E to include TURN's bill inserts in its billing envelopes.¹⁸ The PUC required TURN's bill inserts to state that its messages are not those of PG&E.¹⁹

14. The Supreme Court ruled that PG&E's bill inserts are entitled to "the full protection of the First Amendment."²⁰ The Court explained that the First Amendment protects both "the *voluntary* public expression of ideas..." and "the freedom *not* to speak publicly..."²¹ "For corporations as for individuals, the choice to speak includes within it the choice of what not to say."²² The Supreme Court ruled that despite the state's compelling interest in achieving fair and effective utility regulation, the First Amendment prevented the PUC from ordering PG&E to use its billing envelopes to disseminate a message that it did not want to provide to its customers.²³

15. Direct Energy's request to force Delmarva Power to disseminate Direct Energy's advertising materials in its billing envelopes is no different than what the California PUC wrongfully ordered in *PG&E v. PUC*. Direct Energy is asking this Commission to force Delmarva Power to communicate an advertisement for Direct Energy's product offerings to Delmarva Power's customers. Delmarva Power objects to this compelled communication for the reasons discussed throughout this response. The law has been clear on this issue for at least 30

¹⁷ *Id.* at 906

¹⁸ *Id.*

¹⁹ *Id.* at 907.

²⁰ *Id.*

²¹ *Id.* at 909 (*emphasis original*).

²² *Id.* at 912.

²³ *Id.* at 913.

years – the First Amendment prevents Delmarva Power from being forced to disseminate Direct Energy’s bill insert.²⁴

**G. Direct Energy is Capable of Soliciting
Delmarva Power’s Customers Without
The Anti-Competitive and Unconstitutional
Compelled Use of Delmarva Power’s Billing Envelopes**

16. Finally, Direct Energy can access Delmarva Power’s customers without forcing Delmarva Power to do so for it. Delmarva Power provides all registered competitive electric suppliers in Delaware with access to Delmarva Power’s customer lists through a website that Delmarva Power maintains for competitive retail suppliers. The customer list available to Direct Energy contains the names and addresses of every Delmarva Power customer in Delaware that has not specifically opted out of having its name available to competitive electric suppliers. Multiple Delaware competitive electric suppliers have used this information to conduct direct mail advertising campaigns to Delmarva Power’s customers. Direct Energy, like every other certified electric supplier in Delaware, can use Delmarva Power’s customer lists to send the same information to Delmarva Power’s customers without asking this Commission to force Delmarva Power to do so for it. Direct Energy can use Delmarva Power’s customer lists to inform Delmarva Power’s customers of its competitive retail offerings without providing Direct Energy with an unfair competitive advantage over other competitive retail electricity and rooftop solar providers in Delaware and without violating Delmarva Power’s First Amendment rights.²⁵

²⁴ *Pacific Gas & Electric Company v. Public Utilities Commission of California*, 106 S.Ct. 903.

²⁵ At paragraph 11 of its Petition, Direct Energy claims that it will cover the “incremental costs” of the proposed bill insert such that “[n]one of the incremental costs will be borne by Delmarva or Delmarva’s ratepayers.” Direct Energy’s “offer” to pay incremental costs, while artful, dodges the issue of the true costs. The full cost of delivering bills to customers, including: labor, printing, envelopes, postage, etc., is paid by Delmarva Power and allocated through base rates to Delmarva Power’s customers. If Delmarva Power were ordered to include Direct Energy’s bill insert in its billing envelopes, and Direct Energy were required to pay only the “incremental” (or added) costs of including the billing insert, Direct Energy would be paying only the partial costs of using Delmarva Power’s billing envelopes to advertise its competitive offerings. Direct Energy would avoid paying its

H. Conclusion

For the reasons more fully set forth above:

- a. Compelling Delmarva Power to permit Direct Energy to advertise competitive products through Delmarva Power's bill inserts would give Direct Energy an unfair advantage over all other retail electric suppliers and damage retail electric choice in Delaware to the detriment of Delmarva Power's customers;
- b. Dissemination of advertisements concerning Direct Energy's competitive retail electric supply and solar offerings through Delmarva Power's bill inserts would violate the Code of Conduct by indicating to customers that Delmarva Power has a preference for Direct Energy and its competitive retail offerings over those offered by other competitive retail electricity suppliers;
- c. Compelling Delmarva Power to disseminate Direct Energy's advertising bill insert would violate Delmarva Power's right to Free Speech under the First Amendment to the United States Constitution; and
- d. Direct Energy, like every other competitive retail electric supplier in Delaware, can use Delmarva Power's customer lists to send the same advertising information to customers without forcing Delmarva Power to do so and without providing Direct Energy an unfair competitive advantage.

WHEREFORE, Delmarva Power respectfully requests that Direct Energy' Petition be denied, with prejudice.

Delmarva Power & Light Company



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fair share for use of the billing process, while the remainder of the full cost of the labor, envelopes, postage, etc. is paid in base rates, by Delmarva Power's distribution customers. In other words, charging Direct Energy only the "incremental costs" would be forcing distribution customers to pay the balance of the full costs through distribution rates.

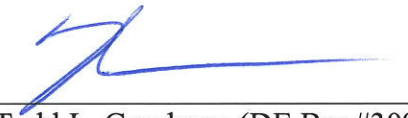
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Certificate of Service

The undersigned certifies that Delmarva Power's Response In Opposition to the Petition of Direct Energy Service, LLC was filed in DelaFile, which automatically provides notices of service to registered users on the Service List in this Docket. Courtesy copies were also provided by electronic mail.



Todd L. Goodman (DE Bar #3096)